November 5. 1744.

INFORMATION

FOR

The Repreſentatives of the deceaſt *John Wightman* ſometime Provoſt of *Edinburgh*, Defenders.

AGAINST

The Children of the deceaſt *William*, *Agnes* and *Elizabeth Hamiltons*, Purſuers.

IN the Year 1716, the deceaſt *Agnes Campbell*, Relict of *Andrew Anderſon* his Majeſty's Printer, execuſed a Settlement, whereby ſhe diſponed her Lands of *Roſeburn*, *Langlands*, *Orchardfield* and others, in favours of *Elizabeth Anderſon*, her Daughter, in Liferent, and *Humphrey Colquhoun*, the ſaid *Elizabeth*'s only Son, and the Heirs to be procreate of his Body in Fie; which failing, to the ſaid *William*, *Agnes* and *Elizabeth Hamiltons* her Grandchildren, equally amongſt them, and the Heirs of their Bodies; which failing, to her own Heirs and Aſſignies whatſoever. And this Diſpoſition contains the following Proviſion, upon the Import of which the preſent Queſtion depends. 7. March 1716.

As alſo it is hereby provided and declared, " That it ſhall not be lawful, nor in " the Power of the ſaid *Humphrey Colquhoun*, or the other Heirs of Tailzie a- " bove ſpecified, to alter, innovate, or infringe the foreſaid Tailzie, or the Order " of Succeſſion therein appointed, or the Nature and Quality thereof

" Lands, Houſes, and others above ſpecified, by virtue of this preſent Right; re- " ſerving nevertheleſs Power and Faculty to the ſaid *Humphry Colquhoun* to pro- " vide a Jointure to any Wife he ſhall marry, not exceeding 50 *l. Sterling*, dur- " ing the Lifetime of the ſaid *Elizabeth Anderſon* his Mother, and 100 *l. Sterling* " after her Deceaſe.

Upon the above Diſpoſition, a Charter was expede under the Great Seal, of the Lands of *Roſeburn*, which held of the Crown, in virtue of which the ſaid *Elizabeth Anderſon* and *Humphry Colquhoun* were infeft in Liferent and Fie reſpectively, and the above irritant Clauſe was ingroſſed in the Infeftment. 26. July 1720. 13. Aug.

The ſaid *Humphry Colhuhoun* having died before his Mother without Iſſue, the ſaid *William*, *Agnes* and *Elizabeth Hamiltons* the next Subſtitutes were ſerved Heirs of Proviſion in ſpecial, and infeft upon a Precept from the Chancery; but the above irritant Clauſe is not inſert in their Infeftment; nor was this Diſpoſition ever recorded in the Regiſter of Tailzies. 10. July 1723.

Humphry Colquhoun the firſt Inſtitute had never been infeft in the other Lands of *Langlands* and *Orchardfield*, which held of Subject-ſuperiors; and ſo as the Right he had to theſe Lands was perſonal at his Deceaſe, the ſaid *William*, *Agnes*, and *Elizabeth Hamiltons* made up their Title to the ſame by a general Service as Heirs of Proviſion to him, in virtue of the Deſtination contained in Mrs. *Anderſon*'s Settlement above-mentioned. 22. June 1723.

The ſaid *William*, *Agnes* and *Elizabeth Hamiltons* did, in the Year 1725, ſell the whole above Lands to the deceaſt Provoſt *Wightman*, who was infeft in the Lands of *Roſeburn*, upon a Charter under the Great Seal upon their Reſignation, and in the other Lands of *Langlands* and *Orchardfield*, he expede his Infeftment upon the Procuratory in Mrs. *Anderſon*'s Diſpoſition, aſſigned to him by the ſaid *William Hamilton* and his two Siſters, who had Right thereto in virtue of their general Retour above mentioned; and thereafter brought a Proceſs of Multiplepoinding in the Year 1728 againſt the ſeveral Creditors of the ſaid *William*, *Ag-*

nes

nes and *Elizabeth Hamiltons*, and paid the Price to them, as they were ranked and preferred in the ſaid Proceſs..

After the Price has been ſo many Years ago paid, and Poſſeſſion had by the Provoſt and his Repreſentatives, in conſequence of this Purchaſe, the Children of the ſaid *Agnes*, *Elizabeth* and *William Hamilton*, have thought fit to raiſe a Proceſs of Reduction of the Diſpoſition granted by them to Provoſt *Wightman*, as granted without any adequate onerous Cauſe, and as flowing from Perſons who had no Right to grant the ſame, becauſe they were debarred by the prohibitory and irritant Clauſes in Mrs. *Anderſon*'s Diſpoſition above recited: And therefore concluding that it ſhould be found that the ſaid *William Agnes* and *Elizabeth Hamilton*'s had controveened the ſaid irritant Clauſes by granting the ſaid Diſpoſition, and that the ſame ought to be declared void and null, at leaſt that the ſame ought to be reduced, under Condition that the Purſuers, within ſix Months after the Decreet, make Payment to the Defenders of the Sums paid by Provoſt *Wightman*, as the Price of the ſaid Lands: Or at leaſt, that the Defenders ſhould be decerned to pay to the Purſuers as much, as with the Sums paid by Provoſt *Wightman*, will amount to the full Value and Price of the ſaid Lands.

When this Proceſs came in, it was anſwered for the Defenders, That the Lands had been purchaſed by Provoſt *Wightman* their Predeceſſor at a full and adequate Price, and the ſame long ago paid up to the Seller's other Creditors; that the prohibitory and irritant Clauſe the Purſuers refer to, did noways diſable the Heirs of Tailzie to contract Debt, or ſell the Lands for onerous Cauſes, but allenarly to alter or innovate the Order of Succeſſion; that the ſaid Clauſe was not inſert in the ſpecial Retour and Infeftment expede by the ſaid *William Hamilton* as their Title to the Lands of *Roſeburn*, nor in the general Retour, which was their Title to the other Lands; nor was the Tailzie ever recorded in the Regiſter of Tailzies, and conſequently theſe Clauſes could have no Effect againſt Purchaſers, had they been intended to diſable the Heirs to do onerous Deeds, as they certainly were not.

The Lord *Elchies* Ordinary pronounced the following Interlocutor with reſpect to the Lands of *Roſeburn*, in which the Purſuers have acquieſced.

Having conſidered the above Debate, aſſoilzies the Defenders from the Declarator as to the Lands of Roſeburn, *in which* William, Agnes *and* Elizabeth Hamilton*'s were infeft at the Time of Provoſt* Wightman*'s Purchaſe from them, in reſpect that the Diſpoſition and Tailzie by Mrs.* Anderſon *in their favours, was not regiſtrate in the Regiſter of Tailzies, as the Act* 1685 *directs; nor are the irritant Clauſes contained in the ſaid Tailzie, ingroſſed in the Retour and Infeftment following thereon, and decerns as to theſe Lands: But ordains Parties to be heard with reſpect to the other Lands in Mrs.* Anderſon*'s Diſpoſition, in which they were not infeft at the Time of the Sale.*

And at a ſubſequent Calling, his Lordſhip has taken the Queſtion with reſpect to theſe other Lands in which Provoſt *Wightman*'s Authors were not infeft, to Report.

And in the *firſt* Place, 'tis hoped the Purſuers will not now diſpute the Oneroſity of Provoſt *Wightman*'s Purchaſe, ſince it was made ſo clear to the Lord Ordinary, that they could have nothing to object to it; and accordingly, upon that Footing his Lordſhip pronounced the above Interlocutor with reſpect to the Lands of *Roſeburn*. The Fact is, That the Provoſt, at the Date of his Diſpoſition, granted Bond to the ſaid *William*, *Agnes* and *Elizabeth Hamiltons*, for Payment of 24,000 *l.* certain in all Events, and for Payment of 12,000 more, in caſe *Elizabeth Anderſon* who liferented the Lands, ſhould deceaſe betwixt and the Term of *Martinmas* 1726. This 36,000 *l.* made about twenty two Years Purchaſe of the whole Lands, which was fully as high a Price as they were worth; and the Price retained for the Liferent, was little more than ſeven Years Purchaſe, which would have been a reaſonable enough Agreement, if it had been to be retained in conſideration of the Liferent from the Date of the Sale: But the Agreement was made in a manner ſtill more beneficial for the Sellers, when the Provoſt conſented to give them a Year and a half longer after the Time of the Sale, *viz.* down to *Martinmas* 1726; that if before that Time the Liferenter ſhould deceaſe, they ſhould have the Benefit of the Price of the Liferent, without any Abatement, only be obliged to diſcount the ſame, in caſe ſhe ſhould happen to ſurvive that Period. So there is no Pretence to make any Objection to the Oneroſity of the Purchaſe, nor

19. *April* 1725.

in-

indeed did the Purſuers lay any Streſs upon this; on the contrary, they have acquieſced in the Lord Ordinary's Interlocutor, with reſpect to the Lands of *Roſeburn*, which ſuppoſes the Purchaſe to be onerous and adequate, as it undoubtedly was.

And therefore the only Queſtion in this Caſe is, Whether from the above Clauſe in Mrs. *Anderſon*'s Diſpoſition the Heirs of Tailzie were diſabled to contract Debts, or to ſell the Lands for Payment thereof: And, 2*dly*, If the Clauſe could have this Import, Whether it could be effectual againſt Purchaſers, when the Tailzie was not regiſtrate in the Regiſter of Tailzies, as the Law directs.

And with reſpect to the *firſt*, the Defenders apprehend there is nothing better eſtabliſhed in Law, than the Difference betwixt a Prohibition to alter the Order and Courſe of Succeſſion, and a Prohibition to ſell or alienate for onerous Cauſes, or to contract Debts which may affect the Lands. That the firſt only hinders the Fiar from doing any voluntary Deed, which may prejudge the Succeſſion limited by the Settlement, but leaves him full Fiar of the Lands with reſpect to all onerous Deeds, whether Alienation of the Lands or Contraction of Debts, whereby his Creditors may affect the ſame. So the Lord *Stair* obſerves *p.* 220 near the End, That where there is an expreſs Obligement not to alter the Tailzie, though it will give Intereſt to the Heirs of Tailzie to quarrel and reduce ſuch Alterations; *yet it will not exclude Alterations by Appriſings or Adjudication for Debts truly borrowed by the Fiar*. And the ſame is alſo agreed upon by our other Lawyers. *Dirleton*, Voce *Tailzie Queſt.* 4. ſuppoſes the Caſe of a Tailzie made and a Bond granted by the firſt Inſtitute, that he ſhould do no Deed to diſinherit the other Heirs of Tailzie, but ſhould keep the Tailzie inviolable; and though he ſtates other Queſtions as doubtful upon the Effect of this Settlement, yet he makes no Doubt of this, that the Inſtitute though ſubject to the above Limitation, may notwithſtanding thereof diſpone the Eſtate for onerous Cauſes. Nor does Sir *James Stewart* in his Anſwer appear to have any Doubt upon this Point, though he differs from *Dirleton* in ſome of the other Points ſtated. And as far as has hitherto occurred to the Defenders, there is not any Lawyer who has ſaid, that a Prohibition to alter or innovate the Order of Succeſſion will diſable the Fiar for the Time from doing onerous Deeds which may affect the Eſtate.

And when the Deciſions of the Court are looked into they go entirely upon the ſame Plan. *Durie* obſerves a Caſe decided *July* 15th 1636, betwixt *James Drummond* of *Drumdow* and Mr. *David* and *Malcolm Drummonds*, where *James* having been decerned by Decreet arbital for an onerous Cauſe, to tailzie his Lands in Favours of Mr. *David* and *Malcolm*'s Heirs Male, failing Heirs Male of his own Body; and having accordingly made a Tailzie in the above Terms and expede a Charter and Saſine upon it; but having afterwards Occaſion to ſell the Lands, Mr. *David* inſiſted in a Proceſs concluding, that this was contrary to the Obligation he came under by the Decreet arbitral, whereby he was obliged to allow the Succeſſion of his Eſtate to deſcend to the Purſuer, failing Heirs of his own Body, and could not fruſtrate that Succeſſion ſo contracted in his Favours for a valuable Conſideration. But the Lords found, " That notwithſtanding of the " Tailzie, the Party obliged to tailzie might ſell the Lands, and the Alieniaton, " however it took away from the Purſuer the Hope and Benefit of Succeſſion a- " ny ways by virtue of that Tailzie, yet it was found not to impede the Party " obliged to ſell upon urgent and juſt Cauſes the Lands; and there was no Fraud " or Guile qualified againſt him, that it was done to fruſtrate the Tailzie directly, " (which if it had been alledged might have had its own Conſideration) neither " bears the Decreet any ſuch Clauſe prohibiting the Party to ſell the Lands, nor " has the Party obliged himſelf not to ſell them nor to contract Debt in his urgent " Affairs." That is, in other Words, a Prohibition to ſell muſt be ſpecially expreſt, and is not implied in a Limitation with reſpect to the Deſcent of the Succeſſion. And the Lords further found, That the Defender was not obliged to refound the Money, which he had got for making this Tailzie, in conſequence of the Decreet arbitral, becauſe he had implemented his Obligation, and the after Sale of the Lands was noways inconſiſtent with it; he was only limited from altering the Tailzie or Courſe of Succeſſion, but was not limited from ſelling the Lands or contracting Debts which might affect the ſame, which is a thing quite diſtinct from

an Alteration or Infringement of the Courſe of Succeſſion.

And the like Deciſion was pronounced *January* 14th 1631, *Helen Sharp* contra *John Sharp*, where a Contract having been entred into betwixt two Parties, obliging them to tailzie their Lands mutually to one another, failing Heirs of their own Bodies, the Lords found, that neither of the Parties could break this Tailzie without the Conſent of the other: So they were in the ſame Caſe as if there had been an expreſs prohibitory Clauſe againſt altering the Courſe of Succeſſion, which indeed behoved neceſſarily to be implied from the Onerosity of the Contract. But at the ſame time the Lords found, " That in theſe Caſes the Contracters may ſell " and annalzie the Lands at their Pleaſure, notwithſtanding of the Contract of Tail- " zie; for this Contract, or other like Contracts, extends not to prejudge the Parties " or any of them, in any Liberty which they had before the Contract, except on- " ly concerning the Succeſſion to their Right, wherein they having agreed upon " an Election of their Succeſſion and the Manner thereof, that was not alterable " by them, but by Conſent as ſaid is." And the Author adds, " That theſe " Contracts extend only to give the Right of Succeſſion to the Perſons appointed " by the Parties, that they may ſucceed after the deceaſe of the Contracters up- " on the Conditions contained therein; ſo that if there be nothing to ſucceed to, " there can nothing be ſought by them." And he obviates the Objection, that if by this Liberty allowed by the Parties to ſell, they ſhould endeavour to elide the Force of the Contract in *totum*, by making Alienations for the Behoof of other Succeſſors than theſe agreed on in the Tailzie, by obſerving that ſuch Fraud if attempted would in Law be irreparable.

And of ſuch Limitations againſt voluntary Alterations of the Courſe of Succeſſion, or gratuitous Deeds to the Diſappointment thereof, while at the ſame time the Perſon ſo limited has the full Property of the Eſtate with reſpect to every onerous Deed, there are Multitudes of Inſtances known in Law, and which every Day occur before your Lordſhips: One who ſucceeds to another in virtue of a gratuitous Settlement made in his favours, but under a Proviſion of Return conceived in favours of the Granter's own Heirs, is in Law underſtood to be limited, that he cannot alter or infringe the Courſe of Succeſſion provided to the Heirs of the Granter; yet it was never doubted that, for onerous Cauſes, he may diſpoſe of, or affect the Subject in any Manner he thinks fit.

So alſo a Father, who is tied down by his Contract of Marriage, that the Succeſſion of his Lands ſhall deſcend to the Heirs of the Marriage, is under as ſtrong a Limitation not to alter or diſappoint their Succeſſion, as if the moſt expreſs prohibitory Clauſe were inſert to that Purpoſe. But there is no Queſtion that the Father has full Powers to exerce every Act of Property upon the Lands, by ſelling, burdening with Debts, *&c.* theſe are not underſtood to be Contraventions of the Limitation he is under not to prejudge the Succeſſion ſtipulated to the Heirs of the Marriage, although it is as ſtrong from the Effect of the Law, and the neceſſary Import of ſuch Contracts, as the moſt expreſs Prohibition to alter or infringe the Order of Succeſſion could make it.

And ſo much is this true, that even where Diligence is done by Inhibition upon ſuch Contracts to interpel the Lieges, yet ſtill the Father's Powers with reſpect to onerous Deeds are not impaired, becauſe the Diligence can go no further than the Import of the Obligation itſelf, which only limits him from altering the Succeſſion thereby eſtabliſhed. This Caſe is put by Lord *Dirleton*, Whether a Father, bound by a Contract of Marriage to reſign certain Lands in favours of himſelf and Wife in Liferent, and the Heirs-male of the Marriage, may, after Inhibition uſed upon the Contract, diſpone the Lands notwithſtanding the Inhibition? And he anſwers thus: " He may diſpone the ſame, being Fiar, and the Import of the ſaid Oblige- " ment is, That the Right of Succeſſion as to the ſaid Lands ſhould be ſecured to " the Heirs of the Marriage, in caſe the Father ſhould deceaſe in the Fie of the " ſame, ſo that he cannot provide them to other Heirs; but it is not intended " thereby that the Father ſhould not have the Right competent to all Fiars, *viz.* " That they may diſpoſe of the ſame if their Condition requires."

And as the Effects of theſe ſeveral Kinds of Limitations, and the Difference betwixt them, is perfectly well known in Law, ſo the Defenders are adviſed, that it is a conſtant Rule obſerved by this and all other Courts, in interpreting Limitati-

ons

ons annexed to Property, that they are never extended further than the neceſſary Import of the Words uſed by the Maker of the Settlement, and that for two plain Reaſons, *firſt*, That ſuch Limitations, ſo far as concerns onerous Deeds, are not only Reſtraints upon Property, but a great Incumbrance upon Commerce and Credit, and therefore ought not to be preſumed, unleſs they are expreſly enacted by the Will of the Proprietor, in Terms plain and unambiguous, and which admit of no other Conſtruction; to infer them by Implication, where not expreſt, would be to lay a Snare for fair Purchaſers and Creditors, who contract for a valuable Conſideration with a Proprietor, who, from the plain and obvious Import of the Deed, does not appear to be tied up from onerous Contractions. And *2dly*, That it is in the Power of every Perſon who makes a Settlement, to expreſs the Limitations he intends in clear and diſtinct Terms, and he cannot complain that Limitations are not implied which he has not expreſt, ſince it is his own Fault if they are omitted.

Upon theſe Principles your Lordſhips have always explained Clauſes conceived in doubtful and equivocal Terms, againſt the Reſtraint attempted to be inferred from them, and in favours of Freedom, and the full Exerciſe of Property, where the Clauſe could poſſibly admit of that Conſtruction. Thus, where Aſſignies are excluded in Bonds of Proviſion, though the *Seclusion* is *general*, yet your Lordſhips conſtrued it to refer only to *gratuitous Aſſignies*, and not to reſtrain the Proprietor from aſſigning or diſpoſing for onerous Cauſes. And it is a conſtant Rule in the Interpretation of Entails, That where ever any Clauſe is omitted, which is neceſſary to make the Limitation and Reſtraint effectual, though the Omiſſion may very probably have happened *per incuriam*, yet the Court never interpoſes to ſupply the Defect, but allows it to ſtrike againſt the Entail. Thus, where the Maker of the Entail has expreſly irritated the Debts to be contracted by the Heir, but has not adjected an Irritancy to the Right of the Contraveener, that Irritancy is not ſupplied, though the Want of it makes the other Irritancy ineffectual. And *è converſo*, where the Contraveener's Right is irritated, but the Drawer of the Entail has forgot to inſert a Clauſe irritating the Debts contracted by him, though there can hardly be a Doubt of the Intention of the Tailzier in ſuch a Caſe; yet your Lordſhips will not interpoſe to extend the Limitation by Conſtruction, however probable, but the Debts of the Heir will be ſuſtained to affect the Eſtate. It is not ſufficient that the Tailzier may have intended they ſhould not be effectual, he ought to have expreſſed it in clear and diſtinct Terms.

Theſe Obſervations, founded in your Lordſhips eſtabliſhed Practice, carry the Matter a good deal higher than the Defenders have Occaſion to plead in this Caſe; for they apprehend the Limitation in this Entail is nowiſe doubtful or ambiguous, it is clearly reſtricted to a Prohibition to alter, innovate or infringe the Order of Succeſſion eſtabliſhed by the Tailzie, or the Nature and Quality thereof; and it is abundantly apparent, that there is a wide Difference betwixt ſuch Alterations and onerous Contractions, or Diſpoſal of the Lands in the Way of Sale, and that no Argument is to be drawn from the one to the other. Were the Words doubtful, the Law does not permit them to be extended by Interpretation; but here the Words uſed by the Maker of the Entail are nowiſe doubtful, nor capable of ſuch Extenſion.

Your Lordſhips will remember a Caſe decided in the Year 1732, betwixt Mr. *Hepburn* of *Keith* and the Earl of *Hopeton:* By the Tailzie of the Eſtate of *Keith* the Heirs were declared " To have no Power to contract Debts, or to burden the " Eſtate any Manner of Way, except for Payment and Defrayment of the Debts " and Burdens wherewith the Tailzier ſhould burden the ſame; as alſo excepting " competent Proviſions to any Wives they ſhould marry, not exceeding the third " Part of the yearly free Rent of the Eſtate:" And in caſe of their Failure therein an Irritancy was adjected. Notwithſtanding which your Lordſhips found, That the Heir had Power to ſell the Lands, becauſe there was no expreſs Prohibition to ſell; and your Lordſhips Decree was affirmed upon an Appeal. If it is then eſtabliſhed, That an Heir, who is under an expreſs and enix Prohibition and Irritancy, in the Caſe of contracting of Debts which may affect the Lands, is yet at full Liberty to ſell the whole for onerous Cauſes, although no rational Intention can be figured which ſhould have moved the Tailzier to diſpenſe with the one Limitation and enact the other, merely becauſe it is contrary to the Genius of the Law, and

to the publick Utility, that ſuch Reſtraints ſhould be introduced by any Implication how plauſible ſoever: How can it with any Colour be maintained, that a Reſtraint from *onerous Alienations* and *Contractions*, is to be inferred from a Clauſe which goes no further than to prohibite the *Alteration* of the *Succeſſion*, when nothing is better known in Law than the Difference betwixt theſe two Kinds of Reſtraints, nor can be more rational than to leave the Heir at Liberty with reſpect to the firſt, though he is tied down as to the other.

It was argued in behalf of the Purſuers, " 1*mo*, That when an Heir of Tailzie " ſells the Lands, he truly alters and infringes the Order of Succeſſion, as much as " if he did, by an expreſs Deed, make a new Deſtination thereof; and it were ab- " ſurd, that he ſhould be allowed to do indirectly, and by Equivalent, what he can- " not do directly, without falling under the preciſe Words of the Entail. 2*do*, " That here an irritant Clauſe is adjected, which would have been unneceſſary, had " the Prohibition been underſtood to extend no further than to gratuitous Alterations " of the Succeſſion. And 3*tio*, That in that View, neither would it have been ne- " ceſſary to reſerve Power to the Heirs to provide their Wives, which yet is here " done, and muſt concur to ſhow, that the Limitation was underſtood to extend " to all Deeds, whether onerous or gratuitous, whereby the Succeſſion of the Heirs " of Tailzie might be diſappointed."

But, with great Submiſſion, there is not the leaſt Weight in any of theſe Obſervations: Nothing is more frequent than to tie up Heirs from altering the Channel of Succeſſion, and at the ſame time to leave them at Liberty, with reſpect to every onerous and rational Exerciſe of his Property; and indeed this is the moſt reaſonable Species of Entails which can be made. Nor can a Sale of Lands, or Contraction of Debt, be ſaid to be a Contravention of ſuch Entail; for let the Succeſſion be ever ſo unalterable, it can ſubſiſt no longer than the Subject ſubſiſts to which the Heirs are to ſucceed, and under the Burdens laid upon it by the Fiar. Indeed if Lands were ſold, to give away the Price to other Heirs, ſuch gratuitous Deed might be challenged, as an indirect Method to elude the Succeſſion; but where the Sale is at an adequate Price, and that is applied towards Payment of the Seller's Debts, as in this Caſe, there is no room to pretend that it was done with a View to diſappoint the Succeſſion of the after Heirs.

And with reſpect to the Irritancy, it was very proper that the Prohibition ſhould be guarded by an Irritancy, though nothing more was intended but to reſtrain the Heirs from altering the Courſe of Succeſſion. It is well known to the Lords, that it often happens that even where no other Condition is put upon the Heir, but to take the Name and Arms of the Deviſer, yet this is guarded with irritant and reſolutive Clauſes; and whatever the Condition is, it is juſt that the Contraveener ſhould incur an Irritancy: But then the Irritancy cannot make the Condition larger or more extenſive than it is conceived, no more than an Inhibition upon a Contract can enlarge the Obligation in the Contract. Diligence and Irritancies are only Fences to guard and ſecure the Obligation from being contraveened and eluded, but they cannot make it broader than it is of its own Nature. There was a ſtrict Irritancy in the Tailzie of *Keith*, but your Lordſhips found the Limitation could not for that be extended to any Caſe omitted in the Tailzie, not even from Parity of Reaſon, far leſs in the preſent Caſe, where Parity of Reaſon cannot be alledged.

And as to the Power given by the Tailzie to provide a Jointure, when the Heirs were tied down from altering the Succeſſion, or doing any gratuitous Deed to diſappoint it, it might naturally occur, that a Faculty to provide Wives ought to be, being in ſome Senſe a gratuitous and voluntary Deed; at the ſame time were this Exception ſuppoſed to have been unneceſſary, it would be no concluſive Argument for extending the Reſtriction beyond what either the Words, or Meaning of the Tailzier would cary it. And ſtill the leſs, as this Clauſe ſeems to have had a particular View to determine the Jointures which might be given by *Humphry Colquhoun* the firſt Inſtitute, in the ſeveral Events of his Mother being alive or deceaſt, and does not relate to any of the other Heirs; whereas in the Tailzie of *Keith*, tho' there was a general Clauſe excepting competent Liferent Proviſions to the Wives of all after Heirs, that Exception was found no ſufficient Argument to extend the Limitation beyond the preciſe Words of the Settlement.

As to the *ſecond* Point, How far the Clauſe, were it to be conſtructed in the Senſe the Purſuers plead, could have any Effect againſt the Defenders, the Heirs of an onerous Purchaſer, in reſpect the Diſpoſition was not regiſtrate in the Regiſter of Tailzies.

Tailzies. The Defenders ſhall not trouble the Lords with many Words upon this Head, becauſe they hope there can be no Difficulty upon the Conſtruction of the Clauſe: But if there could be any, they would ſubmit to the Lords, whether any Limitation upon an Heir of Entail, could be effectual againſt Creditors or Purchaſers, when the Entail has not been recorded as the Law directs. It is the Statute 1685 which gives force to Entails in this Country; and as that Statute carrys them as great a Length as they have been by the Law of any Country; ſo on the other hand it has taken Care to ſecure Creditors and Purchaſers by two ſeveral Notifications, firſt by recording the Tailzie in a particular Regiſter appointed for that Purpoſe, and next by repeating the Clauſes in all the Infeftments and Titles made up to the Eſtate. The Law has not been contented with one of theſe Checks, it has required both for the greater Security of Creditors and Purchaſers. And accordingly it has been found oftner than once, that where a Tailzie was not recorded, tho' the whole Clauſes were *verbatim* ingroſſed in the Infeftments, yet they could have no Effect againſt ſingular Succeſſors, 8. *December* 1724, *James Williſon contra* the Creditors of *Dorater*, obſerved by *Hume*, *Deciſ.* 52. And yet more lately in the Caſe of the Creditors of Sir *George Mackenzie* of *Cromarty*, decided in the Year 1741, and thereafter affirmed by the Houſe of Lords.

The Anſwer made to this was, "That in theſe Caſes the Tailzies were made "real by Infeftment, and ſingular Succeſſors were entitled to contract with the "Heir upon the Faith of the Infeftment, when they did not ſee the Tailzie record-"ed in the proper Regiſter; but here the Tailzie being only a perſonal Right, when "Provoſt *Wightman* purchaſed the Lands, he behoved to regard the Qualities there-"in ingroſſed, which being proper Limitations upon the perſonal Right, muſt have "Effect againſt it, whether recorded or not, ſince they appear from the Face of the "Right itſelf, and no Creditor or Purchaſer could pretend to be ignorant of them".

But it is obvious to your Lordſhips, that however this Argument may be very proper in the Caſe of other Qualities adjected to perſonal Rights, yet in Limitations which are adjected in the way of Entail, it will not apply, becauſe of the expreſs Enactment of the Statute, That no Entail ſhall have Effect againſt Creditors, or Purchaſers, which is not recorded in the Regiſter thereby appointed. And it is no Anſwer, "That they behoved to ſee the Limitation upon their Author from the Face "of his Right, and therefore could not, *bona fide*, contract with him contrary to "the Terms thereof". For the ſame is alſo true in the Caſe where the Tailzie is made real by Infeftment. The Creditors of *Dorater* and *Cromarty* muſt have ſeen the prohibitory, irritant and reſolutive Clauſes *verbatim ingroſſed* in their Authors Saſin, but yet they were not bound by them, becauſe the Tailzie was not alſo notified in the other Method the Law directs. Had it been any other Quality or Burden, than that of a Limitation by way of Entail, they would have been bound, becauſe they ſaw it ingroſſed in their Authors Infeftment. So it does not appear that there is any Difference in this Caſe betwixt perſonal and real Rights. The general Rule in both is, that Qualities ingroſſed in the Right itſelf, or in the Infeftment when real, will affect Purchaſers: But the Statute has made an Exception in the Caſe of Tailzies, That Limitations of this kind ſhall not affect ſingular Succeſſors, tho' appearing in the Body of the Right, or of the Infeftment, unleſs they are entred in a ſpecial Regiſter thereby appointed. Where they are not ſo entred ſingular Succeſſors, tho' they ſee them, are no more bound to notice them, than one is to notice a null Saſin, or a null Inhibition which he ſees on Record; at the ſame time he ſees it, he knows the Law has ſaid it can have no Effect, becauſe the Directions of the Law were not complied with, and therefore he contracts ſafely, without fearing any Danger from an Incumbrance which the Law has declared to be void.

And ſtill the more muſt this hold in the Caſe of Entails, which as unfavourable and troubleſome Reſtraints upon Property, were with Difficulty introduced into the Law, and introduced only under certain Conditions, which if not complied with, they were to have no Effect againſt ſingular Succeſſors contracting with the Fiar of the Eſtate. But the Defenders ſhall not enlarge further upon this Argument, every Conſideration they could ſuggeſt will occur to your Lordſhips; and they apprehend they are entirely ſafe, even upon the Conſtruction of the Clauſe as it ſtands, were it to be effectual againſt them; that it cannot be found to import any further Limitation than againſt Alterations of the Order of Succeſſion, and that their Authors, in virtue of the Fee conveyed to them, muſt be found entitled to the full Exerciſe of the Property as to all onerous Deeds, as to which they were not by any Clauſe in the Entail reſtrained.

JA. FERGUSON.

RECEIVED
96 JAN 22